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# What Ought to be Done—What Can Be Done—When the Wrong Person is in Jail or about to Be Executed: An Invitation to a Multi-Disciplined Inquiry, and a Detour about Law School Pedagogy

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## INTRODUCTION

# WHAT OUGHT TO BE DONE—WHAT CAN BE DONE—WHEN THE WRONG PERSON IS IN JAIL OR ABOUT TO BE EXECUTED? AN INVITATION TO A MULTI-DISCIPLINED INQUIRY, AND A DETOUR ABOUT LAW SCHOOL PEDAGOGY

W. William Hodes\*

### I. INTRODUCTION

In the Symposium that follows these introductory comments, the editors of the *Loyola of Los Angeles Law Review* have assembled an impressive company of thinkers to wrestle with a variation on a well-known hypothetical: What ought a lawyer, a clergyman, and a psychotherapist do when confronted with the knowledge that a stranger is about to be executed for a crime committed by a person with whom each has a professional relationship? In addition to introducing the participants and the problem, I want to argue that what *ought* to be done cannot be considered in the abstract and in isolation, but instead must be considered in context, in conjunction

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In the 1996-97 school year, Professor Hodes will take a year off to serve as law clerk to Supreme Court Justice Ruth Bader Ginsburg, who was one of his law professors during her Rutgers years.

with what *can* be done.

The editors have asked the Symposium contributors to write about but one of the three professions represented in the problem. The Essays are grouped in the order suggested by the problem: Ben Jones, the person who actually committed the crime, first "confesses" to lawyer Claire Hopewell, then to religious counselor Paul Samuels, and finally to psychotherapist Jennifer Palmer. A short biographical sketch of each author is included in an introductory footnote in each essay to help readers discern what insights and experiences each author brings to the discussion of one of the three fictional professionals.

Most of the contributors are law professors—lawyers—who commonly teach legal ethics and professional responsibility courses. They have all used similar classroom examples to underscore the relationship between the legal, ethical, and moral components of a lawyer's work.<sup>1</sup> Beyond this important similarity, however, the law professor contributors collectively display a remarkable diversity of backgrounds and approaches.

Although few have formal seminary training in religious doctrine or practice, many were reared in a religious tradition and use their faith to inform their writing about legal subjects—especially when the legal subject is legal ethics. Others choose to exclude religious concepts from the conversation, whether they personally are atheists or believers. Similarly, while some of the law professor contributors

1. I do not use these three terms interchangeably, but find instead that keeping them distinct is a significant aid to analysis. By "ethics," I mean the broad array of *professional* norms that applies specifically to lawyers, acting as lawyers. Many of these norms derive from tradition, peer pressure, and self-definition of what a professional, ethical lawyer should or should not do. Other norms are *legally* binding, meaning that an infraction can have "legal" consequences, such as disbarment, contempt of court, or disqualification from a case, to say nothing of a malpractice suit. Lawyers are also subject to ordinary legal commands, such as those appearing in the Federal Rules of Civil Procedure, or those involving crime, tort, contract, or tax.

By "morals," I mean norms that express judgments about whether conduct is right or wrong, and the good or evil character of a person engaging in that conduct. One of the most important debates within the law of lawyering asks whether action that is unquestionably both legal and ethical—such as exploiting a "legal technicality" to secure the acquittal of a factually guilty drug dealer—might not be immoral.

In this Essay the distinction between law, ethics, and morality is most clearly evident in connection with the discussion of *State v. Macumber*. See *infra* part IV.C. *Macumber* involved—or appeared to involve—tension between a *legal* rule of evidence (the attorney-client privilege), an *ethical* rule (maintaining the confidences of a client), and the *moral* imperative to do what is right (coming to the aid of another).

have formal education and advanced degrees in moral philosophy, others have only limited "on-the-job training," or choose to strip their analysis of such concerns, limiting themselves to the strictly "legal."

The law professors with broad experience in religion or psychology were drafted to write about the nonlawyer actors in the drama. In addition to this sprinkling of law professors, the second and third groups of contributors consist of professionals who are themselves active in the fields of religious counseling or psychotherapy. Some have direct connections to the legal profession as well—such as teaching law school classes or clinics, counseling lawyers and law students, or appearing as expert witnesses or consultants in legal proceedings. Beyond that, of course, all professionals in the United States today are forced to deal at some level with lawyers and legal concepts.

Clergymen are aware that the narrow and formalistic "priest-penitent" privilege has broadened into a more general privilege that applies whenever confidences are lodged with a spiritual adviser.<sup>2</sup> Psychotherapists are conscious that the traditional, narrow doctor-patient privilege for treating physicians has broadened into a privilege that encompasses a wide range of counseling activities.<sup>3</sup> At the same time, these and other professionals cannot ignore the possibility that giving advice that backfires, or wrongfully revealing confidential material, may lead to malpractice liability.<sup>4</sup>

Accordingly, while the clergymen and psychotherapists who contributed to the Symposium concentrate on how the traditions of *their* professions inform the choices to be made by the corresponding professional in the Symposium problem, they generally do not ignore legal concerns altogether, because legal concerns have become a part of those professional traditions.

## II. TEACHING JUDGMENT THROUGH REAL CASE STUDIES AND HYPOTHETICAL PROBLEMS

Despite periodic grumbling from within and without, and the periodic proclamation of a need for grand-scale reforms, American legal education has remained stubbornly committed to the case

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2. JOHN H. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW §§ 2394-2396 (3d ed. 1940 & Supp. 1993).

3. *Id.* §§ 2380-2391.

4. *See, e.g., Tarasoff v. Regents of the Univ. of Cal.*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

method of teaching for over one hundred years.<sup>5</sup> The content of legal doctrine—what the law “is”—is in the main revealed to students through deconstruction of a series of real—usually appellate—court opinions. This holds even in areas of the law dominated by statutes or codes, such as civil procedure, evidence, income taxation, or commercial law, because in our common-law system, the gloss that the cases put on those texts is itself a major component of “the law.”

The deductive process of decoding the doctrinal messages locked up in the cases also serves as a practical exercise in “learning by doing” because the analytic skill thus honed mirrors what practicing lawyers actually do when *they* read cases and other legal texts. Although arguing from precedent is hardly a mechanical process that yields a uniform result as dependably as a computer program, the call of precedent is sufficiently strong to provide both a starting point and some boundary lines for lawyerlike advocacy.<sup>6</sup> Indeed, argumenta-

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5. Keying in the words “case method” on my library’s LegalTrac CD-ROM, I generated a list of 65 titles—not all of which, concededly, were on point. A representative exchange was led off by Paul Carrington, *Hail! Langdell*, 20 LAW & SOC. INQUIRY 691 (1995), separating Harvard Law Dean Christopher Columbus Langdell’s somewhat silly notions of “scientific” legal reasoning from his more important and more lasting contribution of introducing the case method.

Professor Carrington received several responses: Laura Kalman, *To Hell with Langdell*, 20 LAW & SOC. INQUIRY 771 (1995); William P. LaPiana, *Honor Langdell*, 20 LAW & SOC. INQUIRY 761 (1995); John H. Schlegel, *Damn! Langdell*, 20 LAW & SOC. INQUIRY 765 (1995).

The so-called *McCrate Report*, urging law schools to pay more attention to the development of lawyering skills and professional values, is at bottom an attack on the case method, or at least on too heavy a reliance on it. American Bar Ass’n, *Task Force on Law Schools and the Profession: Narrowing the Gap, Legal Education and Professional Development—an Educational Continuum*, 1992 A.B.A. SEC. LEGAL EDUC. & ADMISSION TO THE BAR 1. The *McCrate Report* has also generated a substantial amount of literature.

In many ways, the 1992 *McCrate Report* was prefigured by the 1979 *Cramton Report*. American Bar Ass’n, *Report and Recommendations of the Task Force on Lawyer Competency: The Role of the Law Schools*, 1979 A.B.A. SEC. LEGAL EDUC. & ADMISSION TO THE BAR 1.

6. To be sure, some scholars of the Critical Legal Studies school have claimed that common law is “radically indeterminate” and provides *no* check on the unfettered discretion of elite judges to rule as they please. In this view, studying lines of cases has little practical value because there is always another line of cases available to support any contrary position, and if no precedent is available, the judge will create one on the spot.

This, however, radically overstates the level of indeterminacy present in the system. As noted immediately below in the text, there are boundaries to legitimate disputation, commonly described in both legal ethics and civil procedure as the line separating the “frivolous” from the “nonfrivolous.” Professor Sanford Levinson, an important voice of Critical Legal Studies, noted the connection in his article entitled *Frivolous Cases: Do Lawyers Really Know Anything at All?*, 24 OSGOOD HALL L.J. 353 (1986). Professor

tion that openly disdains the accepted tradition of dealing with precedent in good faith is by definition out of bounds and not lawyerlike. It is frivolous argumentation, and lawyers engaging in it are subject to both professional censure and the imposition of sanctions in connection with ongoing litigation.<sup>7</sup>

Recently, Anthony Kronman has argued in his elegant book, *The Lost Lawyer*,<sup>8</sup> that using common-law cases as the primary teaching materials in American law schools serves a related but more far-reaching purpose.<sup>9</sup> Forced to confront and to evaluate a series of choices that others, especially appellate judges, have made in concrete situations, law students develop not only knowledge and the intellectual skill of reasoned analysis, but also the character trait and habit of good judgment, or what Kronman also calls "prudence," "wisdom," or "legal statesmanship."<sup>10</sup> Furthermore, forced by the give-and-take of classroom discussion to consider and even to advocate ideas that they do not personally hold, students are taught detachment and tolerance, and ultimately the ability to engage in sympathetic discussions about ends, not just means.<sup>11</sup>

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Levinson concluded that frivolous, as opposed to extremely weak, legal argumentation does exist, is not exceptionally difficult to recognize, and *must* exist if there is to be such a thing as an accepted tradition of what "law" is. The category of frivolous arguments, however, cannot be *described* without resort to "radical indeterminacy."

7. See, for example, Model Rule of Professional Conduct 3.1, which bars a lawyer from bringing or defending cases, or asserting positions therein, "unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1983).

In civil litigation, the most recent version of Federal Rule of Civil Procedure 11 requires lawyers to certify—upon pain of sanctions—that factual matters asserted in their pleadings "have evidentiary support," and that legal contentions are "warranted by existing law," or by "nonfrivolous argument" that seeks to distinguish or overturn existing law. FED. R. CIV. P. 11. Under some circumstances, the offending lawyer's *client* may be sanctioned as well. *Id.* Earlier versions of Rule 11, and many state rules modelled after it, contain prohibitions of a similar kind.

8. ANTHONY T. KRONMAN, *THE LOST LAWYER* (1993).

9. *Id.* at 109-12.

10. *Id.*

11. A shocking example of students who failed to learn these lessons is recounted by Professor Deborah Rhode in chapter 11 of her brilliant text, *PROFESSIONAL RESPONSIBILITY—ETHICS BY THE PERVASIVE METHOD* (1994). The controversy arose when the problem was announced for the 1990 Marden Moot Court Competition at New York University Law School. *Id.* at 496. It involved a fictional matrimonial dispute in which a divorcing father sought to deny the mother custody of the couple's child on the ground that her lesbianism made her an unfit parent. *Id.*

After some students refused to participate in arguing the father's position, the student

If Dean Kronman is right—at least about this aspect of the case method of teaching law—then the case method ought to be especially appropriate for teaching the deeper reaches of the law of lawyering. In the view of many lawyers and scholars—including those who disagree on many particulars of that branch of the law—two key attributes of “good” lawyers are precisely this ability to exercise sound judgment and discretion in concrete, often complex and morally ambiguous, situations, and the willingness to participate with clients in genuine—which is to say nonmanipulative—“moral dialog” about what the client “ought” to do.<sup>12</sup> Thus, while the task of imparting

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moot court board withdrew the problem, stating that the father's position “was not an open question” in a law school community that condemns antigay bias. *Id.* at 497. The students thus demonstrated neither the courage to engage in intellectual debate, nor the wisdom to countenance the possibility that others, including judges, might hold the contrary view in good faith. The only “skill” they demonstrated was the exercise of raw political power—a skill unlikely to be useful in the service of a *real* future client who might happen to be a divorcing lesbian mother! See, e.g., Linda Gibson, *Mom's a Lesbian. Dad's a Killer. Judge: She's Unfit*, NAT'L L.J., Feb. 12, 1996, at A9 (describing *Ward v. Ward*, a case pending in the First District Court of Appeals of Florida, in which a divorced father and his fourth wife were granted custody of his daughter from his second marriage on the ground that the second wife was living with a female companion, despite the fact that the father had murdered his first wife).

In defense of the protesting students, it may be said that the artificial posture of an appellate moot court problem deprived them of the opportunity they would have had in real life to either refuse to take the father's case, or to take his case but to engage in a moral dialog with him about what ends he *ought* to seek, and only then by what means. As described below in the text, however, a moral dialog is only a legitimate element of lawyering if the dialog itself is genuine and nonmanipulative. It seems unlikely that the students embroiled in the Marden controversy would be capable of lending a sympathetic—even if critical and independent—ear to a client in the father's situation.

12. See, e.g., Jamie G. Heller, *Legal Counseling in the Administrative State: How To Let the Client Decide*, 103 YALE L.J. 2503 (1994); Peter Margulies, “Who Are You to Tell Me That?”: *Attorney-Client Deliberation Regarding Nonlegal Issues and the Interests of Nonclients*, 68 N.C. L. REV. 213 (1990). The concept of a “moral dialog” is perhaps most clearly associated with Thomas L. Shaffer, *The Practice of Law as Moral Discourse*, 55 NOTRE DAME L. REV. 231 (1979), and his later book, THOMAS L. SHAFFER, *ON BEING A CHRISTIAN AND A LAWYER: LAW FOR THE INNOCENT* (1981).

Model Rule of Professional Conduct 2.1 provides that lawyers *shall* exercise independent professional judgment and render candid advice, but that in doing so, they *may* make reference to moral, political, or other factors. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 (1983). This is a significant endorsement of the principle that while lawyers must serve their clients zealously and loyally, they are not required to do so as moral zombies or automatons.

It is important to note, however, that my depiction of the moral dialog included the conditions that it must be genuine and nonmanipulative. Some lawyers take the idea of Rule 2.1 and run too far with it, inappropriately manipulating or bullying their clients into doing what *the lawyer* thinks they ought to do, fancied up as what is presumed or claimed to be in *the client's* best interest. A dialog, in other words, becomes a monologue, unless

the actual content of the law of lawyering may or may not be well served by the case method of teaching, inculcating the habits of thought that underlie lawyering itself *will* be well served.<sup>13</sup>

It is commonly said that what law students take from the cases, beyond doctrine, is the "real" curriculum of American law schools—learning to "think like a lawyer." But if Kronman is right, that old saw must be modified to read "learning to think like an appellate judge"—and this would hold not only for the traditional first-year courses, but for legal ethics as well. This does little damage, however, to the view that American legal education, while university-based, is *professional* training of the highest order. As Dean Kronman shows at some length, the ability to think like an appellate judge is also an important professional skill for the practicing lawyer. Not only must litigation and negotiation lawyers be able to predict for clients what the judges will say—if it comes to that—as in the classic legal realism of Holmes and Llewellyn,<sup>14</sup> but counsellors, advisors,

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the lawyer is willing to "lose" the moral debate and accept the client's position as tenable. In most situations, the lawyer will *then* still be able to make an independent judgment about whether to serve, or to continue to serve, the client.

13. Not everyone agrees that the case method is suitable for teaching the kind of detachment that is a prerequisite for genuine moral dialog. In David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31 (1995), the authors specifically reject any such implication of Anthony Kronman's *The Lost Lawyer*, although they agree with Kronman that "good judgment" is the single most important attribute and "stock in trade" of a good lawyer. *Id.* at 34.

In order to *teach* good judgment, however, Luban and Millemann prescribe very heavy doses of clinical education and cite with approval many authorities claiming that a clinical setting is the *only* setting in which the habit of sound moral judgment can be taught. *Id.* at 64-66. The mechanism for inculcating the habits of thought that make up good judgment is either learning by imitation or learning by trial and error. *Id.* at 65. Neither method will have the desired result, however, unless the one being imitated or the one pointing out the errors has sound judgment and is able to describe the judgment process.

For this reason alone, Luban and Millemann's paean to clinical education must be rated as deliberately overdone for effect. The authors implicitly concede as much by citing the work of clinical instructors, especially Robert Condlin, who agonize over the possibility that *bad* clinical teachers may model manipulative behavior and teach correspondingly *bad* moral judgment to their students. *Id.* at 64 n.133. Indeed, in the Henry Drake case, *Drake v. State*, 247 S.E.2d 57 (Ga. 1978), the lawyer who knew that the wrong man was on death row and tried to *prevent* his release was a clinical instructor at the University of Georgia School of Law. See discussion *infra* part IV.B.

14. Perhaps the most famous single statement of legal realism is from Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897) ("The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."). A "runner-up" statement is from KARL LLEWELLYN, *THE BRAMBLE BUSH* 12 (1951) ("What these officials [of the law] do about disputes is, to my mind, the law itself:").



and transaction lawyers must also think about the "justness" or "rightness" of what they are doing in partnership with their clients, as well as its social consequences.<sup>15</sup> This is but a reprise of the earlier point about moral dialog.

Although the case method has remained largely intact as the basic teaching strategy in American law schools,<sup>16</sup> the last twenty or thirty years have seen a significant expansion of the raw materials employed. Not only do law teachers continue to use classroom hypotheticals to pose challenging variations to the actual cases, but they have added more or less sophisticated "problem cases" to the mix to test consistency of analysis and commitment to doctrine.

The use of problems in addition to litigated cases enriches the classroom with a touch of realism. In the hands of the best teachers, problems can so change the pedagogical dynamic of even a large class that it suddenly resembles an intimate clinical practicum, or at least the "rounds" that are integral to the process of medical education.<sup>17</sup> For one thing, the problems are often taken from real cases or real transactions, and put students into realistic role playing situations that capture the decision-making process that virtually always precedes successful litigation or settlement, or the successful completion of a business or financial transaction.

Much more important, however, is that the use of problems and role plays can transform the classroom inquiry from a third person to

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15. To be sure, Kronman has oversimplified somewhat in order to make his main point. There are surely times (many times) when litigating lawyers (and trial judges, for that matter) must make narrow technical decisions that are thoroughly cabined by existing law that has been crafted by others.

16. This is not to deny that during the same period of time, legal education was significantly enriched by the development of live-client clinical legal education on the medical school model, as described by Luban and Millemann, *supra* note 13, and the vast literature they invoke. Furthermore, clinicians helped classroom teachers develop simulated role plays at every level of sophistication and complexity. It is still true, however, that most legal education is delivered via some variation of the case method, and that virtually all first-year courses are taught predominantly in that mode.

17. In "ward rounds" in particular, one student at a time "recites" the proper diagnosis and care of a patient, but all of the students learn from that student's interaction with the patient and with the teacher-physician.

The literature on the use of problems in law schools is extensive. See, e.g., Myron Moskowitz, *Beyond the Case Method: It's Time to Teach with Problems*, 42 J. LEGAL EDUC. 241 (1992). Of course, as I noted earlier, clinicians have made an enormous contribution in developing problems and role plays for their own use and for use in ordinary classroom settings. See *supra* note 16.

a first person vantage point.<sup>18</sup> Students no longer dissect what the judge *did* or debate what the lawyer *should* do, nor even what they themselves *would* do in a like situation; instead, they discuss with each other what they *will* now do—in simulation, but in real time. Thus, the true curriculum of the modern American law school continues to be not merely “the law” simpliciter, but making *judgments* about the law, *in context*.

### III. THE SPECIAL CASE OF TEACHING ABOUT THE LAW OF LAWYERING: JUDGMENT, DISCRETION, AND THE ROLE OF “DOOMSDAY” SCENARIOS

During the same time frame—roughly the last twenty-plus years—the teaching of what is variously described as “legal ethics,” “professional responsibility,” or “the law of lawyering” has experienced a revolution of its own. Beginning as a curricular backwater, often staffed by part-time teachers telling cynical war stories, or junior faculty members dragooned by their deans to teach unfamiliar material, this branch of the law has by now attracted a solid core of career specialists, including some of the best and brightest scholars and teachers in the academy.<sup>19</sup> The literature about the subject matter and the literature about the pedagogy have grown in quantum leaps, both as to quantity and as to quality.

Since by its nature legal ethics focuses more attention on the problems that lawyers face in their professional work than it does on the substantive problems that lawyers help their clients solve, it is not surprising to find that the shift from an exclusively third person vantage point to a first person vantage point has proceeded at an

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18. Ironically, it was David Luban who first brought this point to my attention, despite his generally pessimistic view about the efficacy of most classroom teaching. See Luban & Millemann, *supra* note 13. Professor Luban made his point about shifting from a third person to a first person viewpoint in connection with the teaching of legal ethics specifically, a subject I turn to below.

19. Even here there is disagreement. Luban and Millemann continue to be depressed about the situation—indeed that is the impetus for their article, the genesis of their title *Ethics Teaching in Dark Times*, and the reason they “gave up” on classroom teaching of judgment about legal ethics. Luban & Millemann, *supra* note 13. On this issue, however, I am quite confident that the authors have passed beyond ordinary scholarly exaggeration into plain error! This conclusion is based on no scientific studies—just my own experience talking and chatting on the Internet to dozens of committed scholars and teachers, and reading as much as I can of their vast scholarly output, including quite a bit from David Luban himself.

accelerated pace.<sup>20</sup> Legal ethics teachers often employ in-class simulations and role plays, and in addition to textbook treatment, several bibliographies of such materials are in circulation.<sup>21</sup> Dozens of film excerpts from documentary or fictional accounts of lawyers at work are also commonly used, together with a rich library of "vignettes," sometimes accompanied by expert commentary from a panel of lawyers and judges.<sup>22</sup>

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20. One of the most widely used texts for teaching the law of lawyering is THOMAS D. MORGAN & RONALD D. ROTUNDA, *PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY* (6th ed. 1995), originally published in 1976. Morgan and Rotunda introduce each unit of material with a problem in the mold of the Symposium problem, always including nuance and context, and often including realistic dialogue. Professor Andrew L. Kaufman uses a similar format, except that the problems are much more condensed, and he often utilizes a series of problems on the same topic to showcase variations on a theme: ANDREW L. KAUFMAN, *PROBLEMS IN PROFESSIONAL RESPONSIBILITY* (3d ed. 1989).

Problems of intermediate complexity are featured in N. CRYSTAL, *PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION* (1996) and RICHARD A. ZITRIN & CAROL M. LANGFORD, *LEGAL ETHICS IN THE PRACTICE OF LAW* (1995). Professor Deborah Rhode's text on teaching legal ethics by the "pervasive method" includes treatment of several substantive areas of the law in which ethical issues may arise, much of it introduced through problems or case studies. The chapter on Constitutional Law, for example, revolves around the Marden Moot Court controversy in which law students refused to "represent" a father seeking to deprive his lesbian ex-wife of custody of their child. RHODE, *supra* note 11.

21. In the Teachers Manual to ROY SIMON & MURRAY SCHWARTZ, *LAWYERS AND THE LEGAL PROFESSION* (1994), Professor Simon provides detailed instructions and background materials for a series of role plays and simulations that he advocates be used throughout the course. Most of the role plays were developed by Professor Carrie Menkel-Meadow in connection with earlier editions of the same text. In addition to problems, numerous role plays are also built-in to CRYSTAL, *supra* note 20.

See also, Marsha Bird & Charles Sorenson, *Selected Annotated Ethics Bibliography* (New England School of Law, 1995) (on file with the *Loyola of Los Angeles Law Review*); Vanessa Merton, *Basic Bibliography for Research in Legal Ethics and Professional Responsibility*, in STEPHEN GILLERS, *REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS* 853 (3d ed. 1992); Deborah L. Rhode, *Annotated Bibliography of Teaching Materials: Keck Center on Legal Ethics and the Legal Profession* (Stan. Univ. Keck Center) (on file with the *Loyola of Los Angeles Law Review*).

22. See ROGER CRAMTON, *AUDIOVISUAL MATERIALS ON PROFESSIONAL RESPONSIBILITY* (1988), for a somewhat dated bibliography published by the American Bar Association, which includes descriptions and evaluation of materials ranging from feature films to episodes of the television series *L.A. Law*. See also sources cited *supra* note 21.

In STEPHEN GILLERS, *REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS* (4th ed. 1995), the author has included several "scripts" of lawyers discussing ethical issues in rich detail. Some of these scripts have been performed by professional actors, and the resulting videotapes are available from New York University Law School under the title *Adventures in Legal Ethics*.

Although at first blush it would seem that the use of film clips is a move *backwards*,

By the same token, the legal ethics courses provide the perfect laboratory in which to experiment with, and attempt to verify Anthony Kronman's postulate in *The Lost Lawyer* that what makes American legal education such a potent professionalizing experience is its focus on prudence or judgment in varied contexts.<sup>23</sup>

Unfortunately, although this feature of the teaching of the law of lawyering holds extra promise, it also creates an extra layer of difficulty. The difficulty—which I call the “doomsday syndrome”—arises out of a pedagogical paradox that is common to much of law school teaching, but its effect may be more pronounced in legal ethics. In order to highlight areas where “judgment” is crucial, text writers and teachers must often pick examples—whether real or hypothetical—in which there is a marked contrast between the available choices; in everyday life and in everyday practice, however, much more uneventful judgments are typically the order of the day.

For example, important common-law rules of property or contract may have evolved over a long series of cases with closely balanced policy arguments on each side, and law students learn what Dean Kronman calls “good judgment” by following in the footsteps of common-law judges as they work through such problems and triangulate to a relatively stable solution. In routine practice, however, a lawyer does *not* reinvent these wheels, but demonstrates his or her good judgment mainly by discerning where the development of the rule has *now* come to rest, and guiding a client's actions accordingly.

Examples of a descent from the dramatic to the commonplace occur with greater regularity in legal ethics. On the one hand, legal ethics—as presented to law students—is full of high drama and stark choices, many of them involving clashes not only of policy, but of fundamental moral values. Consider, for example, the famous “Buried Bodies Case,”<sup>24</sup> in which the confidentiality principle clashed

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towards third person passive learning, the most dramatic scenes often produce the opposite effect in students. While nominally discussing the situations portrayed on the screen in the third person, students approach the material with an intensity that betrays the fact that they are substituting themselves into the story and thinking in the first person. The ability to “hide” behind the fictional characters “liberates” them to talk about themselves. That, at least, was the theory that I espoused in introducing the 1990 Annual Meeting program of the Association of American Law Schools, Section on Professional Responsibility, entitled “Problems, Role Plays, and Videotape.”

23. KRONMAN, *supra* note 8, at 240-41.

24. *People v. Belge*, 372 N.Y.S.2d 798 (1975) (dismissing indictment of attorney for failure to report the death of a person not known to medical authorities), *aff'd*, 359 N.E.2d

with the desperate need of grieving parents to know whether their daughter was alive or murdered, or at least where her body might be found. In *Spaulding v. Zimmerman*<sup>25</sup> "zealous" lawyers attempting to minimize a tort defendant's civil liability did not disclose to a young plaintiff that his doctors had overlooked a life-threatening aneurysm that the defense doctors *had* discovered.<sup>26</sup> Another example is *Commonwealth v. Stenhach*,<sup>27</sup> in which two young lawyers defending a murder case found the murder weapon and claimed they had a duty to withhold it from the government, when in fact the law was well established that they instead had a duty to produce it *without awaiting a subpoena*.<sup>28</sup>

On the other hand, however, a key lesson of modern legal ethics scholarship is that the real bite of the law of lawyering lies in its pervasive and "everyday" quality. It has often been noted that the *Model Rules of Professional Conduct* have much more of the "feel" of a positive law criminal code than the *Model Code of Professional Responsibility* it replaced, and that the *Code* in turn was more "code-like" than earlier statements of professional tradition, including the *Canons of Professional Ethics*.<sup>29</sup> Nonetheless, discretionary language still abounds in the *Model Rules*, recognizing—while at the same time underscoring—the continuing need for judgment.<sup>30</sup>

377 (N.Y. 1976). Virtually every law school text on professional responsibility contains discussion of this case, often including excerpts from contemporary press accounts. The account of one of the lawyers in the case is contained in TOM ALIBRANDI & FRANK ARMANI, *PRIVILEGED INFORMATION* (1984).

25. 116 N.W.2d 704 (Minn. 1962).

26. *Id.* at 707. To be fair, it should be noted that neither the examining doctor nor the defendant—who was personally close enough to the plaintiff to have given him a ride in his car—disclosed the aneurysm either. *Id.*

It is possible, of course, that the defense lawyers never told the defendant about his friend's situation, in the cynical belief that the defendant would "naturally" want to maximize his chances in the lawsuit by withholding information that could hurt his case. Although some might unthinkingly applaud this approach as "zealous advocacy," most commentators today would regard it as a shocking betrayal *of the client* by preempting the client's moral autonomy and depriving the client of the opportunity to "do the right thing."

27. 514 A.2d 114 (Pa. Super. Ct. 1986), *appeal denied*, 534 A.2d 769 (Pa. 1987).

28. *Id.* at 119.

29. Professor Geoffrey Hazard, reporter to the commission that drafted the *Model Rules*, has written extensively on this subject. Luban and Millemann comment thoroughly on the process of "devolution" and "de-moralization," including Hazard's role in it. See *supra* note 13; see also Maura Strassberg, *Taking Ethics Seriously: Beyond Positivist Jurisprudence in Legal Ethics*, 80 IOWA L. REV. 901 (1995) (discussing Hazard's work in this area).

30. The discussion that follows immediately below in the text is based on GEOFFREY C. HAZARD JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON*

Lawyers may only charge such fees as are "reasonable,"<sup>31</sup> for example, but what is reasonable is a highly contestable proposition that must in the first instance be judged by an interested party—the lawyer setting the fee. Since the typical client will not know enough to contest any but the most outrageous fees, the main enforcement mechanism in this area of legal ethics is the quiet, day-to-day, self-restraint of individual lawyers. Almost all of the rules regulating conflicts of interest—even conflicts between lawyer and client—may be waived by the client after the client has been "counseled" in the matter. But the one doing the counseling will generally be the same lawyer who has a financial interest in continuing the representation, and the counseling will generally take place out of the public eye. Whether the lawyer will subtly "shade" the explanation is not the stuff of high drama, but it is at the very heart of legal ethics.

To take one more common example, the law of lawyering imposes an enforceable duty upon lawyers to report the misconduct of other lawyers—but only where the misconduct "raises a *substantial* question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."<sup>32</sup> Depending upon one's views about what it means to be "fit" as a lawyer, one will have different views about whether a particular misdeed casts "substantial" doubts on that score. Furthermore, one's view may also be colored by other concerns, such as a prior relationship with the lawyer in question, the interests of clients who have dealt with the lawyer, the likelihood of repetition, and so forth. Once again, the vast majority of "judgment calls" will be made in private and *not* later subjected to public scrutiny.<sup>33</sup>

Thus, learning to debate extreme moral dilemmas may *not*, after all, provide the best training for the series of small choices that arise constantly in legal practice. As Professors Hazard, Koniak, and Cramton note in their legal ethics text, while this kind of debate

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THE MODEL RULES OF PROFESSIONAL CONDUCT §§ 501-503 (2d ed. 1990 & Supp. 1996); see also Reed Elizabeth Loder, *Tighter Rules of Professional Conduct: Saltwater for Thirst?*, 1 GEO. J. LEGAL ETHICS 311 (1987) (arguing that rules requiring specific behavior in prepackaged rules will interfere with moral development); cf. William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988) (arguing that lawyers should exercise judgment and discretion in an attempt to "do justice" rather than operate within a system of formalized ethical rules).

31. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5 (1991).

32. *Id.* Rule 8.3(a) (emphasis added).

33. In *In re Himmel* 533 N.E.2d 790 (Ill. 1988), a lawyer was disciplined for failing to report another lawyer's misconduct. The case caused a sensation in legal circles, precisely because public airing of this problem is so rare.

"illuminates the principle at stake, our commitment to it and our compassion for the suffering of others,"<sup>34</sup> it is also true that

by focusing our attention on the rare and exceptional, [extreme examples] . . . may train us to see moral choice *only* when it is presented in stark terms, allowing us to ignore the important lesson that in searching for an "ethical" or "moral" course of action in more mundane situations the choices are apparent *only after a deeper examination of context*.<sup>35</sup>

#### IV. THE "WRONG PERSON" DOOMSDAY SCENARIO: FACT, FICTION, AND PEDAGOGICAL TOOL

There is a good answer to the point just borrowed from Professors Hazard, Koniak, and Cramton. Although the danger of myopia does lie in too much focus on "doomsday scenarios," there is danger of the opposite kind in ignoring them. Although rare or nonexistent in the life of any particular lawyer, highly charged dilemmas presenting excruciating legal, ethical, and moral choices do arise with some frequency within the profession as a whole. Robert Garrow really did tell Frank Armani and Francis Belge where the bodies were buried. Clients do offer to pay criminal defense lawyers in cash—cash that is obviously the fruit of the very crime for which they are being prosecuted. Lawyers do learn that a client is AIDS-infected and deliberately not taking steps to protect a sex partner. Clients who have jumped bail or fled the jurisdiction with a minor child have from time-to-time left a forwarding address with their lawyers.

Indeed, on the very same page of the legal ethics text just quoted, the authors discuss Robert Cover's brilliant and disturbing book, *Justice Accused*,<sup>36</sup> the highlight of which is an account of both the public debate and the private anguish of the greatest nineteenth-century Abolitionist lawyers and judges over whether it is better to support the Constitution and work to change the immoral Fugitive

34. GEOFFREY C. HAZARD ET AL., *THE LAW AND ETHICS OF LAWYERING* 323 (2d ed. 1994).

35. *Id.* at 324-25 (emphasis added). Professor Roger Cramton made the same point in opposition to abstract academic discussion in the American Law Institute of one of the real cases, *State v. Macumber*, 544 P.2d 1084 (Ariz. 1976), that is the basis for the Symposium problem. See *infra* note 132 and accompanying text. Additionally, the Symposium problem itself was deliberately enriched in order to provoke "tailored" responses from the participants, rather than "one-size-fits-all."

36. ROBERT COVER, *JUSTICE ACCUSED* (1975).

Slave laws passed under its authority, or to resist with civil disobedience and "frivolous" argumentation.<sup>37</sup> Furthermore—still on the same page—the authors note that there are even real cases in which the "wrong man in jail" problem has been presented.<sup>38</sup>

The Symposium hypothetical, in other words, has been built on a solid platform. Of all the "doomsday scenarios" commonly discussed in law school classrooms, this one holds special fascination, because it is so stark and so real.<sup>39</sup> Below, I describe three real versions of the story that have intrigued lawyers and law students over the years. My purpose, however, is to blend in the substantive point of this Introduction: that the specific context of each case—including the Symposium problem—colors what *can* be done to alleviate the tragedy, which affects what *ought* to be done. That focus should, in turn, significantly affect the judgments we make in assessing what the lawyers actually *did* do in any particular case.

Considering all three stories in quick succession also reveals a feature that is common to contemporary death penalty jurisprudence and to the matter of new trials generally—prosecutors, courts, and other authorities manifest a truly remarkable steadfastness of purpose in resisting any talk of newly discovered evidence, whether by recantation or otherwise. This resistance is quite understandable, and much of it is morally and ethically unobjectionable.<sup>40</sup>

In the vast majority of cases, prosecutors genuinely and in good

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37. *Id.* at 175-91. Judge Lemuel Shaw of the Massachusetts Supreme Judicial Court held the classic positivist view that even immoral laws and harsh results must be accepted in order to sustain a rule of law that will produce more justice over the long run. *Id.* at 250. But he suffered deep personal anguish in living and judging according to this creed. *Id.*

Professor Cover, noting that Shaw was the father-in-law of the novelist Herman Melville, makes the plausible argument that the character of Captain Vere in Melville's *Billy Budd* was patterned on the judge. *Id.* at 4. In the novel, Vere superintends the legally proper but morally dubious conviction and execution of a naive seaman who has killed a shipboard bully. *Id.*

38. HAZARD ET AL., *supra* note 34, at 324.

39. Although I will describe three real versions of this "doomsday scenario" immediately below in the text, it should not be forgotten that many fictionalized versions exist as well. An episode of the television series *L.A. Law* included such a storyline, and of course the Symposium Problem was itself based on a role play featured in the Public Broadcasting System series *The Constitution—That Delicate Balance*. See *Symposium Problem: The Wrong Man is About to Be Executed For a Crime He Did Not Commit*, 29 LOY. L.A. L. REV. 1543, n.† (1996).

40. I am putting to one side, obviously, whether the death penalty itself is morally supportable. The issue here is simply official resistance to anything that challenges the finality of whatever result has been reached under existing law.



faith believe in the guilt of persons that a jury has found guilty beyond a reasonable doubt.<sup>41</sup> Last minute appeals to new evidence often lack the ring of truth and seem most likely to have been engineered by the convict himself as a desperate attempt to avoid a date with the executioner. Judges at all levels generally take a similar view, factoring in such additional concerns as a presumption of regularity, the ease of fabrication, and the need for finality and efficiency.

Of course, in the rare cases where the conviction has been obtained by unethical means, or where a genuine mistake has been made, the government has a different and less noble incentive to resist reexamination—covering up the fact that it has expended public resources to no end other than bringing an innocent man—or at least a possibly innocent man—to death's door. The existence of such cases, even though no doubt small in number, makes the courts' reluctance even to entertain motions for new trials much less attractive, even though the same arguments about the need for finality are sound in the abstract.<sup>42</sup>

41. That much is hardly surprising. Noted defense attorney Alan Dershowitz has often stated in writing and in his speeches that most persons actually put on trial are in fact guilty. Indeed, in his book, *ALAN M. DERSHOWITZ, THE BEST DEFENSE* (1982), Dershowitz stated that most of his *own* clients had in fact been guilty, *whether or not they were convicted*. *Id.* at xiv-xv.

42. In *Herrera v. Collins*, 506 U.S. 390 (1993), the Supreme Court denied federal habeas corpus relief to a Texas convict who claimed no constitutional error in his original conviction and death sentence, but claimed that newly discovered evidence would demonstrate his "actual innocence." Ironically, for purposes of this Symposium, the proffered evidence included affidavits by several people who claimed that a third person—now deceased—had confessed to the killing for which Herrera had been convicted. See the discussion of *State v. Macumber*, *infra* part IV.C.

Although the Court insisted that actual innocence is not *itself* a ground for relief, it acknowledged that actual innocence is a "gateway" through which a petitioner may pass in order to earn a hearing on constitutional claims that otherwise would have been barred for technical reasons. *Herrera*, 506 U.S. at 404 (citing *Sawyer v. Whitely*, 505 U.S. 333 (1992)). Even with such a restrictive standard in play, the *Herrera* majority nonetheless appeared to be stung by the dissenting Justices' charge that the Court would allow the execution of an innocent person. 506 U.S. at 439 (Blackmun, J., dissenting). Accordingly, the Court pointedly noted that state authorities might still grant clemency, *id.* at 414, and that even assuming that innocence itself was a cognizable claim, the claim of innocence in *Herrera* was extraordinarily weak. *Id.* at 417.

Moreover, two of the Justices concurring in the majority opinion, O'Connor and Kennedy, further hedged their support for it by reference to the weakness of the factual proofs, *id.* at 420-24 (O'Connor, J., concurring), and Justice White concurred only in the judgment because he was unwilling to go beyond that point for purposes disposing of the case. *Id.* at 429 (White, J., concurring).

All of this means that especially when the awful truth that the wrong person is in jail becomes known late in the proceedings, the internal moral and ethical struggle described by the Symposium authors is only part of a larger battle. The reality is that even if Ben Jones can be persuaded to publicly confess his own responsibility for the murder that Frank Smith will soon die for, or even if one of the three professionals in the Symposium problem “blows the whistle” to the prosecutor or to the press without Jones’s consent, Frank Smith will not soon be released.

To return to the implication of the title of this Introduction, it appears that even when a professional faced with the difficulty posed by the Symposium problem decides what he or she “ought” to do, he or she may find it impossible to do it. But if what ought to be done really cannot be done, then an honest moral accounting of the entire situation must factor in the prospect that it not even be attempted!

A. *The Leo Frank Case (and a Hypothetical Variation Posed by a Participant)*

The historical example of a real doomsday scenario noted by Professors Hazard, Koniak, and Cramton in their legal ethics text was the infamous case of Leo Frank,<sup>43</sup> a case that occasioned both the birth of the B’nai B’rith Anti-Defamation League and a resurgence of the Ku Klux Klan.<sup>44</sup> Frank was the Jewish manager of a pencil factory in Atlanta, convicted and sentenced to death in 1913 for

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In *Schlup v. Delo*, 115 S. Ct. 851 (1995), on the other hand, the petitioner was claiming constitutional error in his trial, and used his claim of actual innocence largely as the “gateway” to a review of the merits referred to above. The Supreme Court remanded the case to the lower courts for further development of the facts, after a long discussion of the ultimate burden that the petitioner must bear in demonstrating that the result of the case might have been different if the constitutional errors had not been made.

Although there are important technical differences between *Herrera* and *Schlup* that the Court referred to, *id.* at 861, it cannot be a coincidence that in the latter case there was a much more realistic possibility that the convict really had been wrongly convicted. *Id.*

43. *State v. Frank*, 80 S.E. 1016 (Ga. 1914) [hereinafter *Frank I*], *aff’d*, 237 U.S. 309 (1915) [hereinafter *Frank II*].

44. Professor Kaufman had earlier recounted the same story in ANDREW L. KAUFMAN, *PROBLEMS IN PROFESSIONAL RESPONSIBILITY* 214-15 (3d ed. 1989), in connection with Problem 31, which is very much like the current Symposium problem. Professor Kaufman asked students to consider whether any of the following factors should influence the lawyer’s behavior: the severity of the sentence imposed, the family situation and past history of the wrong man in jail, the family situation and past history of the true criminal, and whether the true criminal might offer some kind of defense or justification. *Id.*

raping and murdering Mary Phagan, a thirteen year-old worker at the factory.<sup>45</sup> There was no physical evidence against Frank, and he was convicted solely on the testimony of a janitor who claimed that Frank had confessed to him and asked for help in disposing of the body.<sup>46</sup> The janitor, James Conley, had a long criminal record, and had himself been detained briefly after he was seen washing a bloody shirt.<sup>47</sup>

The trial was conducted in an atmosphere of intimidation, as mobs on the courthouse lawn shouted to the jury to "hang the Jew."<sup>48</sup> Indeed, the antisemitic hysteria was so great and so evident that when the jury was about to deliver its verdict, the trial judge advised the defendant and even his counsel to absent themselves from the courtroom, for fear that they would both be lynched on the spot if the jury either acquitted or failed to reach a verdict.<sup>49</sup>

According to the autobiography of Arthur Gray Powell, a prominent Georgia lawyer and judge of that period,<sup>50</sup> the trial judge was convinced "to a mathematical certainty"<sup>51</sup> that Frank was innocent, but he too was intimidated by the mob, and denied the motion for a new trial only hours after telling Powell that the motion was unassailable.<sup>52</sup> After the conviction was affirmed by the Georgia Supreme Court and habeas corpus relief denied in the United States Supreme Court in 1915, Governor John Slaton commuted the

45. *Frank I*, 80 S.E. at 1018.

46. *Id.* at 1020.

47. *Id.*

48. *Georgia Pardons Victim 70 Years After Lynching*, N.Y. TIMES, Mar. 12, 1986, at A16.

49. *Frank II*, 237 U.S. at 312. The Georgia courts rejected the claim that threatened mob violence intimidated the jury as not factual. *Id.* at 311-16. The United States Supreme Court refused to issue a writ of habeas corpus because the scope of the writ was much more narrow than in later years, and the ability of the federal courts to re-adjudicate factual determinations—even those concerning the "process" that had been provided—was virtually nil. *Id.* at 345.

50. ARTHUR GREY POWELL, *I CAN GO HOME AGAIN* 287-92 (1943). Powell was born in rural southwest Georgia in 1873, attended two years of college, and had no law school experience. His apprenticeship as a lawyer began as early as age ten when he began to help his father write writs for presentation to the local court.

In his autobiography, Powell unwittingly paints a picture of himself as a white supremacist of the *noblesse oblige* tradition, hating lower class whites most of all for their cruder and more violent forms of racism. But his own racism and elitism are so unencumbered with affectation or regret that they give the ring of truth to the story that he tells.

51. *Id.* at 288.

52. *Id.* at 288-89.

sentence to life.<sup>53</sup> Governor Slaton told some of his friends that he failed to grant a full pardon only because he believed that the true murderer would soon be unmasked, and that the mob that now howled for Frank's blood would be demanding a pardon instead.<sup>54</sup>

Whether or not that would have happened is unknown, but what did happen is that several attempts were made to storm the Governor's mansion and to lynch Governor Slaton—who mounted an armed defense of the mansion along with his wife, a company of National Guardsmen, and some well-connected friends, including Arthur Powell.<sup>55</sup> A few days later, Leo Frank was forcibly removed from prison by vigilantes, and hanged from a tree near the victim's home.<sup>56</sup>

The *Frank* case raises the issues presented in this Symposium, because in addition to all of the above drama, it was a case in which a lawyer *knew* that the wrong man was on death row, but did not or could not take action. In his autobiography, Arthur Powell related the story of Leo Frank almost as an aside,<sup>57</sup> and then added a further detail in a similarly understated way. After the conviction was affirmed, and shortly before the sentence was commuted and the defendant then lynched, he learned the identity of the true murderer from a would-be client. Powell does not state in his book whether the would-be client was the murderer, or merely someone else who knew the truth, although the implication is that it was the former. Nor does he say if the true murderer was in fact the janitor, James Conley.<sup>58</sup>

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53. *Id.* at 289:

54. *Id.*

55. *Id.* at 290.

56. *Id.* at 291.

57. Despite his own significant and dramatic connection to the events in question, the point of Powell's description of the Leo Frank case was mainly to illustrate his highly implausible claim that Southerners of the early twentieth century were eager to lynch any person thought guilty of rape, not just black persons. *Id.* at 277.

Equally improbable was his opening remark that the hysterical reaction to Leo Frank was initially based on the fact that he was Mary Phagan's boss, not on the fact that he was Jewish. *Id.* at 287. According to Powell, the open and pervasive antisemitism that undeniably attended the trial and the subsequent violence was attributable to a backlash against Jewish leaders and "civil rights societies" who fanned the flames by protesting that Frank was a scapegoat. *Id.* at 287-88.

58. One other person knew the truth, and he did say that the true murderer was Conley, but he did not say so for almost 70 years! Alonzo Mann was a young office boy at the time of the crime, and he saw Conley carrying the body of Mary Phagan into the basement where it was subsequently found. Wendell Rawls, Jr., *After 69 Years of Silence, Lynching Victim Is Cleared*, N.Y. TIMES, Mar. 8, 1982, at A12. Mann did not come forward at the time because Conley threatened to kill him if he did. *Id.* Mann's mother

All Powell says is that because of the oath of confidentiality, he could not honorably reveal what he knew—even in 1943 when his autobiography was published—until “after certain deaths occur.”<sup>59</sup>

In explaining the confidentiality principle to a lay audience, Judge Powell quite properly blended in discussion of the closely related evidentiary rule of attorney-client privilege. He reminded his readers that if a lawyer became “so forgetful of his oath” as to attempt to testify about the terrible facts *in court*—let us say in connection with a motion for a new trial on the grounds of newly discovered evidence—it would be the obligation of the judge to refuse to hear it anyway.<sup>60</sup> This does not answer whether there was anything else that Powell could have done, assuming that he ought to have, but he also reminded his readers that he only learned the truth after the convictions had been affirmed. Furthermore, comments that the Governor had made to Powell and some of their mutual friends suggested that Slaton was already in possession of the same facts and would soon follow the commutation with a full pardon.

Judge Powell’s single understated paragraph about his continued silence apparently drew considerable adverse commentary, for he returned to the subject, somewhat defensively, a year later in a brief

also prevailed upon him to maintain silence, predicting (with tragic inaccuracy) that Leo Frank would be found innocent anyway. *Id.*

In 1982, about 20 years after James Conley died, Mann gave an affidavit to the Nashville newspaper *The Tennessean*, describing what he had seen in 1913. *Id.* Despite this evidence, the Georgia Board of Pardons and Paroles initially denied a posthumous pardon, on the ground that it was impossible after such a long time to prove or disprove guilt or innocence. *Georgia Pardons Victim 70 Years After Lynching*, *supra* note 48, at A16. After Alonzo Mann died in 1985, the case was presented again, and in 1986 the Board granted a pardon on the basis that by failing to safeguard Leo Frank’s life, the State of Georgia had made it impossible for him to clear himself at a time when fresher evidence was still available. *Id.*

59. POWELL, *supra* note 50, at 291-92. Assuming that Powell was correct that he “could not” reveal the would-be client’s confidence during the life of that person—or perhaps that person’s intimates—his further assumption, that death of the client would extinguish the obligation, may not be sound. For a brief discussion of whether the duty of confidentiality survives the death of the client, see 1 GEOFFREY C. HAZARD & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 1.6:101, at 130-130.1 (2d ed. & Supp. 1993).

It is much clearer that the evidentiary attorney-client privilege is *not* extinguished upon the death of the client. This proposition was taken as given in the *Macumber* case. See *infra* text accompanying note 122. For a fuller discussion of survival of both the privilege and the ethical duty to maintain confidences, see Brian R. Hood, Comment, *The Attorney-Client Privilege and a Revised Rule 1.6: Permitting Limited Disclosure After the Death of the Client*, 7 GEO. J. LEGAL ETHICS 741 (1994).

60. That was a key point of *State v. Macumber*, 582 P.2d 162 (Ariz. 1978). See *infra* notes 112-20 and accompanying text.

essay in the *Georgia Bar Journal*.<sup>61</sup> This time explicitly distinguishing between the ethical rule of confidentiality and the legal rule of privilege, he reiterated that disclosing the information in court would not only subject him to disciplinary penalty, but would be *ineffective*, because the court could not legally receive his testimony.<sup>62</sup> Not content to rest upon the fortuity of the timing of his discovery, he insisted—correctly for his time and quite probably correctly even today—that the situation would be the same even if he had known the truth *while the trial was still going on*.<sup>63</sup>

Admitting that he would be “strongly tempted” to break the oath in that situation, Powell did not budge on the illegality and the futility of such a course of action. Tying the attorney-client privilege to the Sixth Amendment right to counsel in criminal cases, he continued to insist that evidence about what his would-be client had said would be inadmissible.<sup>64</sup>

Judge Powell, however, continued to avoid discussion of other steps that he could have taken if knowledge of the truth had come earlier, such as informing the prosecutor, informing the state Attorney General, or exerting pressure through a media campaign to exonerate a defendant he knew was wrongly accused. Would such steps have been effective? There are no guarantees, given the tenor of the times. Yet, it is surely fair to say that specific information coming from an establishment figure would not have been ignored entirely, especially at a time when the prosecution had not yet committed all of its resources and its prestige to the prosecution of Leo Frank, and especially when James Conley would still have been under suspicion.

I will leave to the Symposium participants the question whether a lawyer or other professional should make an exception to ordinary professional norms in such changed circumstance, risking disbarment

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61. Arthur G. Powell, *Privilege of Counsel and Confidential Communications*, 6 GA. B.J. 333 (1944).

62. *Id.* at 333.

63. *Id.*

64. *Id.* at 334. It was much too early in the development of the law for Powell to realize that there was a possible constitutional argument, also grounded in the Sixth Amendment, in favor of *allowing* the testimony. As will be discussed in connection with the *Macumber* case, courts today will at least consider the argument that if insisting upon the inviolability of the privilege has the effect of hampering the defense, the Sixth Amendment cuts the other way because it not only has an “Assistance of Counsel” Clause, but also a “Compulsory Process” Clause. The Compulsory Process Clause has been interpreted to include a fairly broad “right to present a defense.” See *infra* note 127 and accompanying text.

or other professional censure as the price of civil disobedience. My point is simply that changing the circumstances in such a fundamental way changes the entire cast of that debate. In the real Leo Frank case, ironically, the real Arthur Powell faced a *diminished* moral dilemma at the time that he actually faced it because, in the precise circumstances of the real case, virtually nothing more could be done. The prosecution surely would not consider reopening an enormously popular death sentence after it had been won, and Governor Slaton appeared to be aware of the truth already. In those circumstances, to break the oath and disclose a client's awful secret would have been little more than a self-indulgence to soothe Powell's conscience and to flaunt his moral superiority.

### *B. The Twelve-Year Ordeal of Henry Drake*

The case history of Henry Drake and William "Pop" Campbell provides a dramatic contrast to the seeming inevitability of the Leo Frank case—the real Leo Frank case, not the hypothetical version discussed by Arthur Powell in the *Georgia Bar Journal*.<sup>65</sup> In this case, which dragged on for some twelve years, a "wrong man" sat on death row, while at least one of the "right man's" lawyers could have taken immediate action that almost certainly would have made a difference.<sup>66</sup>

In December, 1975, a seventy-four-year-old barber was bludgeoned to death with a claw hammer in his own barber shop in rural Georgia.<sup>67</sup> Drake and Campbell, who had met during an earlier prison stay, were charged with the crime, and each implicated the other.<sup>68</sup>

Campbell was tried first, and he testified in his own defense that while he was having his hair cut, Drake came in without warning and killed the barber, hitting Campbell once with the hammer when he protested the attack.<sup>69</sup> At Drake's trial, Campbell continued to testify against Drake, although his story had been embellished significantly for the occasion.<sup>70</sup> Drake admitted that he had dropped Campbell off at the barber shop and picked him up later, but

65. David Kaplan, *Death Row Dilemma*, NAT'L L.J., Jan. 25, 1988, at 35.

66. *Id.*

67. *Id.*

68. *Id.* at 35-36.

69. *Id.* at 35.

70. *Id.* at 35-36.

otherwise denied any prior knowledge or involvement in the murder.<sup>71</sup> He was forced to admit, however, that when he learned from Campbell that Campbell had killed the old man, he had helped him escape to Virginia the next day.<sup>72</sup> The juries did not believe either defendant, both were convicted at their separate trials of first degree murder, and both were sentenced to death.<sup>73</sup>

In private discussions with his lawyer, however, "Pop" Campbell, nearing age sixty, consistently maintained that he alone was guilty, and that he was implicating Drake only because he thought that the younger man had informed on him and engineered his extradition back to Georgia from Virginia.<sup>74</sup> In later discussions about the case, Campbell's lawyer acknowledged that he *knew* of his client's factual guilt before either of the trials began.<sup>75</sup> This means that he knew that his client planned to—and did—commit perjury at his own trial, and that Campbell's follow up perjury was the only reason that an innocent man, Henry Drake, was sitting alongside him on death row. The lawyer, however, later told a reporter that he was "bound by the rules of confidentiality" and could not, in any event, prevent Campbell from exercising his "right to testify."<sup>76</sup> His statement, however, is incorrect; this is a case where the lawyer *could* have made a difference, and where, therefore, a more searching moral inquiry

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71. *Id.* at 35.

72. *Id.* at 36.

73. Drake's conviction and death sentence were upheld in *Drake v. State*, 247 S.E.2d 57 (Ga. 1978).

74. Kaplan, *supra* note 65, at 36.

75. *Id.* Because Campbell's story was both internally consistent and consistent with what both Drake and his girlfriend had said, the lawyer could not resort to the evasion that only jurors "know" what the truth is—and even then only after the case is completed. Professor Monroe Freedman, justly famous for his uncompromising defense of both zealous advocacy and the confidentiality principle, has often branded the claim that lawyers cannot "know" the truth as both sophistic and morally irresponsible. See, e.g., MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 51-57 (1975). Professor Alan Dershowitz, also a well-known defender of the adversary system, has similarly noted that most criminal defendants are factually guilty, *and that their lawyers know it*. See DERSHOWITZ, *supra* note 41, at 117.

Since Campbell told his lawyer the truth, the lawyer also could not avail himself of the subsidiary myth that lawyers never know the truth unless their clients tell them about it, no matter how overwhelming the evidence. This self-serving proposition—if it were valid—would permit lawyers always to escape moral responsibility for knowledge simply by instructing their clients never to tell them the truth. Although this particular myth has been debunked often, it dies hard, and was employed by many of O.J. Simpson's criminal defense lawyers to maintain the pretense that they did not "know" of their client's factual guilt.

76. Kaplan, *supra* note 65, at 36.



about what he *ought* to have done is appropriate.

Certainly at Campbell's own trial, where the lawyer was called upon actually to present and argue false evidence,<sup>77</sup> the lawyer could have—and should have—refused and demanded that his client testify truthfully or not at all. Since in the Campbell case there was essentially no truthful evidence that the defendant could give, this would have meant keeping the defendant off the stand, which is the usual practice anyway, especially when the defendant has a prior criminal record.

Pop Campbell's lawyer might well respond—perhaps contemptuously—that this is merely academic hindsight, disconnected from the “real world” of zealous advocacy. After all—the argument might run—it was only some ten years later that the United States Supreme Court ruled that while a criminal defendant has a constitutional right to testify on his own behalf, he has no right to testify falsely, and that he therefore has no Sixth Amendment right to a lawyer who will aid and abet him in doing so.<sup>78</sup> But that would also be incorrect, despite the correct invocation of *Nix v. Whiteside*.<sup>79</sup>

At the time of the Campbell trial in 1976, courts at every level had universally rejected the notion that a lawyer may knowingly assist a client in presenting perjured testimony. To be sure, even today there is not general agreement on exactly what a lawyer caught in this situation *must* do, and the Supreme Court neither provided an answer in *Whiteside*, nor had jurisdiction to do so.<sup>80</sup> But there was—even in 1976—general agreement about what lawyers must *not* do, namely to sit idly by, prisoners and pawns of their own clients, as Pop Camp-

77. The situation may have been slightly different at Drake's trial because Campbell's evidence would have been presented by the prosecutor, not Campbell's lawyer, and the prosecutor did not know that the testimony was false. Still, if Campbell's lawyer had seen to it that the false story was not presented during Campbell's trial, the prosecutor would not have presented it, even innocently, during Drake's trial.

78. The Supreme Court did not explicitly hold that there is a constitutional right of a criminal defendant to testify on his or her own behalf until *Rock v. Arkansas*, 483 U.S. 44 (1987). A year earlier, in *Nix v. Whiteside*, 475 U.S. 157 (1986), discussed immediately below in the text, the Court dealt with the client perjury issue only after assuming the existence of a basic right to testify. *Id.* at 164.

79. 475 U.S. 157 (1986).

80. As pointed out in the concurring opinion of Justice Brennan, the Supreme Court had jurisdiction only to decide whether or not Mr. Whiteside's conviction was in derogation of his Sixth Amendment rights, because of what his lawyers had actually done. *Id.* at 176-77 (Brennan, J., concurring). The Supreme Court has no authority to dictate to the states how to arrange their criminal justice systems, so long as they meet the minimum requirements of the Federal Constitution. *Id.* at 177 (Brennan, J., concurring).

bell's lawyer blandly and self-righteously assumed was required.

Indeed, it is worthwhile to remember that the Whiteside trial took place in Iowa only about a year after the Campbell trial took place in Georgia, also long before the Supreme Court had spoken. Yet, the lawyers in *Whiteside* made exactly the opposite assumption from Campbell's first lawyer; they took as a given that they were required to do something to avoid actively presenting perjured testimony, and that neither the confidentiality principle nor the defendant's "right to testify" was sufficient to trump their obligation to the system and to the court.<sup>81</sup> They demanded that their client testify truthfully, on pain of disclosure to the court, and the Iowa Supreme Court later commended them "for the high ethical manner in which this matter was handled;"<sup>82</sup> and of course, the United States Supreme Court held that they had *not* denied their client his Sixth Amendment right to effective assistance of counsel, as just noted.<sup>83</sup>

As described so far, Henry Drake's case fits the basic paradigm under discussion: The wrong man is on death row, and the right man's lawyer knows about it. The story is worse than other real and fictional examples—such as the Leo Frank case—because the lawyer knew about the client's perjured testimony *before* it was given, and even made it more likely to happen because of his unethical failure to intervene in some way.<sup>84</sup> But Henry Drake's story gets even worse because the lawyer who took over Pop Campbell's case on appeal actively worked to *keep* Drake on death row, even though he also knew the truth, *and even though his client wanted to right the wrong*.

As if to prefigure the third part of the Symposium problem, Campbell's change of heart came through the intervention of a religious counselor, a local pastor who also ran a death row lay ministry.<sup>85</sup> Campbell confessed to her the very first time she visited him, and she recognized that she had a confidentiality problem of her

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81. This is hardly surprising, since Disciplinary Rule 7-102(A)(4) of the *Model Code of Professional Responsibility*, in effect in both Iowa and Georgia at the times in question, flatly stated that a lawyer shall not "[k]nowingly use perjured testimony or false evidence." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(4) (1986).

82. *State v. Whiteside*, 272 N.W.2d 468, 471 (Iowa 1978).

83. *Nix v. Whiteside*, 475 U.S. at 158.

84. I reiterate that it was not then—and still is not now—absolutely clear what a lawyer *ought* to do in such situations. The only thing that is now—and was then—clear is that lawyers may *not* do what Campbell's lawyer *did* do.

85. Kaplan, *supra* note 65, at 36.

own.<sup>86</sup> This problem disappeared, however, when, over the course of a few months, she convinced Campbell to come forward with the truth as a matter of conscience.<sup>87</sup> But when the pastor sought the help of Campbell's new lawyer, he said that there was nothing he could do and repeatedly warned his client *not* to recant and *not* to talk to anyone about the case!<sup>88</sup>

The lawyer was in the midst of trying to have the death sentence set aside, and he rightly feared that a recantation would torpedo that effort, as well as expose Campbell to a perjury charge.<sup>89</sup> But his client, a fully competent and autonomous adult, was aware of these possibilities and had made a choice that righting the wrong done to Henry Drake was more important.<sup>90</sup> His determination became stronger as his health deteriorated, for he feared most of all being executed or dying in prison with no assurance that Drake would be freed.<sup>91</sup> Nonetheless, the most that the paternalistic lawyer would "allow" the client to do was to prepare an affidavit to be used in the event of Campbell's death.<sup>92</sup>

This appeased Campbell for almost a year, but in April of 1981 his religious counselors helped him prepare another affidavit to give directly to Drake's lawyers.<sup>93</sup> Drake had by now been in prison for over five years and on death row for four, but Campbell's lawyer still put pressure on him to recant his recantation.<sup>94</sup> This was to no avail, and this chapter of the story ended with the filing of a motion for a new trial for Drake and a hearing at which Campbell testified fully about his own solo role in the murder.<sup>95</sup>

But the closing of one chapter only signaled the opening of another. As discussed earlier, courts and prosecutors rarely look with an unjaundiced eye at such late recantations, and this case was no

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86. *Id.*

87. *Id.*

88. *Id.* Strong advocates of teaching legal ethics in a clinical setting, Professors David Luban and Michael Millemann, *see supra* note 13, would no doubt be disturbed to learn that the new lawyer was a staff lawyer at the University of Georgia School of Law Prisoner Project Clinic. Kaplan, *supra* note 65, at 36. Unfortunately, there is no guarantee that clinical teachers will always model either good judgment or ethical lawyering.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

exception. Despite the facts that Drake's conviction and death sentence rested almost exclusively on Campbell's original testimony and that several people were prepared to testify that Campbell's recantation was not of recent origin, the trial court denied relief, and this ruling was affirmed in February of 1982 by the Georgia Supreme Court.<sup>96</sup> Indeed, a majority of the justices used the occasion of the Drake case to confirm that the law was "settled" in Georgia that recantation of a government witness is not grounds for a new trial, even if the recantation is believed.<sup>97</sup>

Pop Campbell died in prison in 1983, and Henry Drake remained on death row.<sup>98</sup> After another two years, his original conviction was overturned by the United States Court of Appeals for the Eleventh Circuit on petition for habeas corpus relief.<sup>99</sup> The chief reason given was that the trial judge's instructions may have misled the jury into thinking that the defendant bore the burden of proof on the issue of intent.<sup>100</sup> The Eleventh Circuit was aware of Campbell's recantation, but did not address it, given its decision to grant relief to Drake on other grounds.

Henry Drake was retried in January of 1987, just over eleven years after the crime.<sup>101</sup> With the Campbell affidavit center stage, the jury nonetheless hung ten-to-two in favor of acquittal.<sup>102</sup> Another trial was held in April of the same year, and this time Drake was convicted and sentenced to life in prison.<sup>103</sup> In the meantime, Drake's cause had been taken up by an unlikely champion, a former police officer who sat on the Georgia Board of Pardons and Paroles.<sup>104</sup> Eight months after his second conviction, and almost

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96. *Drake v. State*, 28 S.E.2d 180 (Ga. 1982), *cert. denied*, 457 U.S. 1111 (1982).

97. *Id.* at 182. To be sure, some of the justices hedged their bets by casting some doubts upon the credibility of the recanted story. The murdered man, although 70 years old, was in good physical condition, whereas Pop Campbell suffered from severe asthma and emphysema, and might not have been up to a prolonged fight. *Id.* at 181. Furthermore, a knife belonging to Drake had been found at the scene of the crime, and his claim that he had earlier given it to Campbell might not be believed. *Id.*

98. Kaplan, *supra* note 65, at 37.

99. *Drake v. Kemp*, 762 F.2d 1449 (11th Cir. 1985) (en banc).

100. *Id.* at 1453. Shifting the burden of proof away from the prosecution is impermissible under *Sandstrom v. Montana*, 442 U.S. 510 (1979). An instruction virtually identical to the one employed by the trial court was found impermissible in *Francis v. Franklin*, 471 U.S. 307 (1985).

101. Kaplan, *supra* note 65, at 37.

102. *Id.*

103. *Id.*

104. *Id.*

exactly twelve years after his initial arrest, Henry Drake was paroled, with the promise of later consideration of a full pardon.<sup>105</sup>

For purposes of this Introduction, the lesson of Henry Drake's ordeal is that while both lawyers representing Pop Campbell acted unprofessionally and unethically, their misconduct affected the "wrong man on death row" in dramatically different ways. But for the trial lawyer's misconduct, there is some significant chance that Henry Drake might have been kept off death row and out of prison altogether. Ironically, however, even though Campbell's appellate lawyer persistently refused to carry out his client's wishes, there may not have been a great deal that he *could* have done to alleviate Drake's situation, even if he thought that he should have. The subsequent history shows that even after Campbell "disobeyed" his lawyer and formally recanted, another eight years passed before Drake was freed—not by action of the judicial system, but in spite of it.

It is of course possible that Campbell's recantation might have been more effective if he had been alive to deliver it in person to the second jury, rather than through affidavits. The second jury, after all, came two votes shy of acquitting Drake as it was. And it is even possible that immediate action by Campbell's second lawyer could have dissuaded the prosecutor from mounting a second and then a third trial. Given the vigor of the later prosecutions and the bitterness with which the action of the Board of Pardons and Paroles was opposed and then denounced, however, these seem unlikely.

Thus, although Pop Campbell's second lawyer was plainly guilty of disloyalty to his own client, what he could have done or ought to have done with respect to Henry Drake remains murky. The question has become whether the inability to influence events very much morally absolves the second lawyer from even trying, which is of course the nagging question that I posed in the title to this Introduction, and the question that I hope readers will take to all of the Symposium articles.

C. *State v. Macumber, the American Law Institute, and the Need to Consider Context*

An Arizona double homicide case, *State v. Macumber*,<sup>106</sup>

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105. *Id.*

106. *State v. Macumber*, 544 P.2d 1084 (Ariz. 1976) (reversing conviction and remanding for new trial) [hereinafter *Macumber I*]; *State v. Macumber*, 582 P.2d 162

involved a less dramatic version of the "wrong person in prison" doomsday scenario, yet it also illustrates most sharply the relationship between what ought and what can be done in such situations. The case is thus a fitting one to conclude this Introduction, for it demonstrates the superiority of an approach that takes account of the rich detail of real life drama over any attempt to "solve" doomsday scenarios with dogmatic pronouncements in the abstract. It is bootless, the *Macumber* case teaches us, to moralize in high dudgeon about the immorality of remaining silent, if a clear-eyed analysis of reality demonstrates that speaking out will not improve the situation.

In the spring of 1962, a young couple was found murdered in the desert not far from downtown Phoenix.<sup>107</sup> Despite an extensive investigation, no substantial leads were developed, and the case lay dormant for a dozen years.<sup>108</sup> In 1974, however, William Macumber came under suspicion after his estranged wife reported to the police that he had confessed to her.<sup>109</sup> Macumber admitted that he had made such statements to his wife, but denied that they were true.<sup>110</sup> With a specific suspect now identified, the authorities soon developed substantial physical evidence of Macumber's guilt, and he was tried and convicted of two counts of first degree murder and sentenced to life in prison.<sup>111</sup>

Long before Mrs. Macumber precipitated the reopening of the double-murder case, Ernest Valenzuela was charged with an unrelated murder that had taken place in roughly the same locale.<sup>112</sup> During consultations with his defense attorneys in 1968, Valenzuela confided that he had killed the young couple as well.<sup>113</sup> He subsequently died, and when his attorneys learned in 1974 that Macumber was to

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(1978) (affirming conviction after second trial) [hereinafter *Macumber II*].

107. *Macumber II*, 582 P.2d at 164.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* The main defense was that Mrs. Macumber had connived with police to frame the defendant by helping them plant evidence. *Id.* at 164-65. Although direct evidence of such a conspiracy was lacking, it was not wholly bizarre, given that Mrs. Macumber had been active in a volunteer search and rescue unit associated with the sheriff's office, had had training in crime scene investigation techniques, had worked in the sheriff's office as a clerk, and had permanently moved out of the marital abode only a few weeks before making her revelations about Mr. Macumber's confession. *Id.* at 164.

112. *Macumber I*, 544 P.2d at 1087 (Holohan, J., concurring) (Ernest Valenzuela was not identified in *Macumber I* but his name was later revealed in *Macumber II*, 582 P.2d at 166.).

113. *Id.* (Holohan, J., concurring).

be tried for the murders that their former client had confessed to committing, they decided that they ought to take action.<sup>114</sup>

The State Bar Committee on Ethics furnished them with an informal opinion stating that it would *not* be improper to disclose what they knew.<sup>115</sup> Accordingly, the lawyers informed both the defense and the prosecution in the *Macumber* case of their knowledge, and were prepared to testify under oath about the confession.<sup>116</sup> The trial judge, however, rejected the proffered testimony *sua sponte*, on the ground that it was barred by the attorney-client privilege—which he ruled survived the death of the client.<sup>117</sup>

On appeal to the Arizona Supreme Court, the *Macumber* convictions were unanimously reversed and the case remanded for a new trial because the trial court had erroneously excluded the testimony of a defense ballistics expert.<sup>118</sup> Since there was to be a second trial, the court pressed on to review the ruling on the attorney-client privilege, which would inevitably figure in further proceedings.<sup>119</sup>

The majority opinion upheld the sanctity of the privilege, treating the matter as one of relatively simple hornbook law. First, a statute established the basic attorney-client privilege.<sup>120</sup> Second, although the privilege belongs to the client and may be waived by the client, a third party—including the court on its own motion—may assert the

114. *Id.* (Holohan, J., concurring).

115. *Id.* (Holohan, J., concurring). As later described by the Arizona Supreme Court, this ethics opinion dealt with “the privilege of attorney-client,” *id.* (Holohan, J., concurring), although it is more likely that it actually dealt with the confidentiality principle embodied in Canon 4 of the then-applicable *Model Code of Professional Responsibility*. Typically, ethics committees disclaim any authority over—or even expertise in—matters of law or legal interpretation, and the scope of the attorney-client privilege is plainly a matter of evidence law, not professional ethics.

With respect to the professional ethics issue, it is not known whether the Committee thought that the ordinary prohibition on disclosure did not apply because the client was deceased, or because the potential harm to *Macumber* was sufficiently grave to trigger an “exception.” If an exception did apply, it could only have been an informal or *ad hoc* exception for the one arguably applicable exception to MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C) (1980), the so-called “required by law” exception, could not actually apply, because no law, court order, or subpoena “required” the lawyers to do anything.

116. *Macumber I*, 544 P.2d at 1086.

117. *Id.*

118. *Id.* at 1087.

119. *Id.* at 1086.

120. *Id.*

privilege on the client's behalf in the absence of the client.<sup>121</sup> Third, the privilege does not terminate with the death of the client, except in situations—such as a will contest—where it is assumed that disclosure would be or would have been in the client's interest.<sup>122</sup> Although excluding potentially powerful evidence of exculpation is harsh, the legislature presumably took into account such a possibility when it established the privilege in the first place, but found the policies favoring an essentially absolute privilege more compelling.<sup>123</sup>

Two of the five justices disagreed with this view. Their main argument was that the United States Supreme Court had recently held that states were *prohibited* from employing ordinary evidence rules to hamper the defense in the presentation of its case.<sup>124</sup> Thus, while the Assistance of Counsel Clause of the Sixth Amendment<sup>125</sup> would almost certainly prevent the prosecution from making use of statements the defendant made to his or her lawyer,<sup>126</sup> where the defendant wishes to introduce exculpatory evidence coming from *someone else's* lawyer, barring it runs afoul of the Compulsory Process Clause of the Sixth Amendment,<sup>127</sup> as well as the more general due process right to a fair trial.

The concurring justices in *Macumber* were willing to concede that the privilege serves important societal purposes, and that it probably

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121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 1088 (Holohan, J., concurring).

125. U.S. CONST. amend. VI.

126. Introduction of such statements would not violate the defendant's Fifth Amendment rights even if they were incriminating, and even if the lawyer was compelled to reproduce them by subpoena or otherwise. Since the client would have made the original statements *voluntarily*, there is no compulsion against the one who might be incriminated.

127. U.S. CONST. amend. VI. The Compulsory Process Clause states that "the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor." *Id.* The key case was *Chambers v. Mississippi*, 410 U.S. 284 (1973), in which the Supreme Court held that a refusal to recognize the "statement against penal interest" exception to the hearsay rule was unconstitutional if it barred the testimony of a *defense* witness. *Id.* at 302. This holding was reaffirmed a few years after the *Macumber* case, in *Green v. Georgia*, 442 U.S. 95 (1979), even though the hearsay statements did not have the same indicia of reliability as those in *Chambers*. *Id.* at 97. According to the Supreme Court, the point of the compulsory process clause is to require that exculpatory evidence be put before the jury. *Id.* The defendant, in other words, must be allowed to "present a defense." The jury will, of course, still decide for itself whether to believe or disbelieve the evidence.



survived the death of Valenzuela.<sup>128</sup> Given the death of the client, however, the strength of the privilege must be seen as diminished, for at a minimum the "right person" could no longer be prosecuted and substituted for the "wrong person" in jail.<sup>129</sup> Characterizing the attorney-client privilege after the death of the client as no more than a "property interest of the deceased client," the dissenting justices would have held it outweighed by the nascent constitutional right of the defendant "to present a defense."<sup>130</sup>

As the second trial began, *State v. Macumber* thus appeared to present a classic variation of the Symposium problem: the wrong person is in jail and the right person's lawyers know it. But right from the start, *Macumber* was less dramatic of a "doomsday scenario" than some of the others. For one thing, no death penalty was involved. For another, the informal opinion of the Ethics Committee had removed much of the emotional stress: the problem had become a technical duel over evidence law rather than an excruciating moral or ethical quandary. Thirdly, given the Arizona Supreme Court's explicit ruling, there seemed little that *could* be done since the lawyers were not going to be allowed to testify, and the prosecutors seemed quite confident that they had the right man, even knowing of Valenzuela's confession to his lawyers.

Perhaps most telling of all was that the strong indicia in the Leo Frank and Henry Drake cases that the "wrong man" really was the wrong man were missing. While there was nothing to indicate that the lawyers were insincere in their report of the "right person's" confession, the circumstances under which he gave his statement—including a delay of some six years—did not inspire the same degree of confidence as in other cases.

In this posture, the *Macumber* variation on the Symposium

128. *Macumber I*, 544 P.2d at 1088 (Holohan, J., concurring).

129. *Id.* (Holohan, J., concurring).

130. *Id.* (Holohan, J., concurring); see Steven G. Churchwell, *The Constitutional Right to Present Evidence: Progeny of Chambers v. Mississippi*, 19 CRIM. L. BULL. 131, 131 (1983); Robert N. Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee Right in Criminal Trials*, 9 IND. L. REV. 713, 713 (1976).

Book length treatment of the subject may be found in EDWARD J. IMWINKELRIED, *EXCULPATORY EVIDENCE* (1990), the annual supplement to which was prepared for several years by Professor David Leonard of Loyola Law School of Los Angeles. According to § 10-5(a) of the treatise, courts today generally reject a balance that favors displacement of the attorney-client privilege, but more and more are expressing willingness at least to engage in such a balance, and to concede that in the proper case, the "right to present a defense" might prevail. *Id.* § 10-5(a).

problem provoked a spirited—but almost comically off-point—debate in the American Law Institute (ALI). The ALI has been in the process of drafting a *Restatement of the Law Governing Lawyers* for a number of years, and at its 66th Annual Meeting in Philadelphia in 1989, it debated proposed section 132, a provision dealing with the crime-fraud exception to the attorney-client privilege. The reporter, Professor Charles Wolfram of Cornell Law School, had included a proposed Illustration 4, which was based on the facts of the first *Macumber* case, except that the client who confessed to his lawyers was still alive. The point of Illustration 4 was that since the client's communication to the lawyer concerned a *past* crime, the crime-fraud exception would *not* apply, the attorney-client privilege *would* apply, and the evidence would be inadmissible.<sup>131</sup>

A number of ALI members indignantly demanded deletion of Illustration 4—but without objecting to the proposed text of section 132, which was a routine statement of when the privilege would *not* apply. Obviously confusing the ethical rule of confidentiality with the legal rule of evidence, they further muddled the waters by insisting that it would be *immoral* for a lawyer not to come forward to “do the right thing” and correct such a wrong. A lawyer with the courage to engage in civil disobedience in this instance should be praised, not condemned, they said, “daring” any disciplinary authority to impose punishment.

This, of course, missed the point of *Macumber* entirely for the State Bar Committee on Ethics had already given the lawyers advance permission to “violate” the ethical rule of confidentiality, and the lawyers had already attempted to do what the ALI critics assumed was “the right thing.” But even if it is clear what *is* right in this situation—a subject on which the Symposium authors will disagree—there is still the brute problem that the rules of evidence as laid down by the Arizona Supreme Court appeared to prevent the

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131. Arthur Gray Powell had made the same point in discussing his own dilemma in the Leo Frank case. *State v. Frank*, 80 S.E. 1016 (Ga. 1914), *aff'd*, 237 U.S. 309 (1915). In his brief essay in the *Georgia Bar Journal*, he reminded readers that although he did not hear the confession of the true murderer until after the trial was over, the *legal rule of evidence* would be the same even if he had learned the truth before the trial began. Powell, *supra* note 61, at 333.

At the time of the Leo Frank case, of course, no argument could have been made that the defendant's right to present a defense trumped the evidentiary privilege. It is curious, however, that no participant in the ALI debate voiced the thought that perhaps the *Macumber* result was *unconstitutional* rather than immoral. See *supra* notes 127-30 and accompanying text.

lawyers from doing anything further. *That* was the point of Illustration 4, and also of this Introduction.

The debate in the ALI ended with a plea by Professor Roger Cramton for a more nuanced approach to the evidentiary rule itself. He too found the illustrative case "revolting," as it stood, but added that it was revolting in part "because it states a stark, moral quandary, without any richness or depth, without the certainty of the lawyer's knowledge of the client's guilt, without other information about the client or consequences to the client of the lawyer's action."<sup>132</sup>

As far as the transcript of the ALI proceedings reveals, the participants in the debate were not aware that the real *Macumber* case *did* provide considerably more richness in the second trial and subsequent appeal than was apparent in the stark all-or-nothing duel over the privilege in the first appeal. The denouement of the *Macumber* case will allow me to segue to some concluding observations about the richness and detail deliberately built in to the Symposium problem.

At the close of the State's case in the second *Macumber* trial, the defense again proffered evidence of Valenzuela's confession to his lawyers.<sup>133</sup> Furthermore, in a second proffer of special significance to this Symposium, the defense also offered to show that Valenzuela had repeated his confession to a psychiatrist and that when he confessed a third time to another lawyer, that a different psychiatrist was present, having just administered the "truth serum" sodium pentothal.<sup>134</sup> Showing remarkable independence, the trial judge ruled that the privilege issues were *not* foreclosed by the Arizona Supreme Court's first opinion, precisely because the issue had been presented in the barren format of a formal offer of proof, without any factual backdrop.<sup>135</sup>

When the trial judge heard the evidence about Ernest Valenzuela's several "confessions," however, it was at once apparent that they were so utterly lacking in reliability that they ought not to be admitted in the face of the important policies underlying both the attorney-client and the doctor-patient privileges.<sup>136</sup> None of the

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132. It will be recalled that Professor Cramton, along with co-authors Hazard and Koniak, took the same approach in their legal ethics text. See *supra* notes 34-35 and accompanying text.

133. *Macumber* II, 582 P.2d at 165.

134. *Id.* at 166-67.

135. *Id.* at 166.

136. *Id.* at 166-67.

professionals had a firm recollection of what Valenzuela had said, and what they did remember him saying did not square with the known facts of the case.<sup>137</sup> William Macumber was convicted of both murders again, and his convictions were upheld by the Arizona Supreme Court, this time unanimously.<sup>138</sup>

Quoting from the concurring opinion in the first case, the Arizona Supreme Court in effect adopted that view that although the emerging constitutional right "to present a defense" does sometimes require the admission of defense evidence that would not be admissible if offered by the prosecution, the evidence still must satisfy a threshold requirement of trustworthiness.<sup>139</sup> While criminal defendants would prefer a regime in which they can present whatever evidence they like, leaving the prosecution with only the hope that the jurors will weed out patently absurd testimony, that is not the law—including constitutional law.<sup>140</sup>

In retrospect, then, the *Macumber* cases teach mainly the importance of context, because only attention to context allows us to make sound judgments about what the lawyers could and should have done, and whether the rulings of the courts were sensible.

If the case is presented in a stark—and ultimately false—light, as one in which a stick figure "right person" has confessed to stick figure lawyers that a stick figure "wrong person" stands convicted of a serious crime, it is easy to be outraged at a callous legal system that will turn its back by citing a technical rule of evidence or procedure. That is where some ALI members went wrong. But if the case is understood as one in which the person "confessing" is a complex character who is just blowing smoke to impress his lawyers, and the lawyers are merely trying to see that every "i" is properly dotted and every "t" crossed, then it is just as easy to accept the final outcome.

With the stakes so high, it was reasonable to slow the system down long enough to consider the possibility that Ernest Valenzuela was the "right man," not William Macumber. But although it is still possible that Macumber was the wrong man wrongly convicted after all, at least we now know with a high degree of certainty that the identity of the right man is *not* known, and that the lawyers of the right man are *not* sitting on confidential or privileged information in

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137. *Id.*

138. *Id.* at 170.

139. *Id.* at 167.

140. See IMWINKELRIED, *supra* note 130, § 14-1.

a moral quandary about what they ought to do with it, or whether there is anything that they can do with it.

#### V. CONCLUSION: MAKING JUDGMENTS ABOUT THE SYMPOSIUM PROBLEM IN CONTEXT

The editors of the *Loyola of Los Angeles Law Review* have presented the Symposium participants and their readers with a variation of the basic dilemma that is rich in realistic detail. This is no accident. Each nuance was built into the problem as a potential hook for the authors to hang their hats on, a potential platform upon which they might develop further variations or inquiries. And the plan worked; the editors reaped what they sowed! Whether the contributions are read with intense care or scanned, in the order presented or randomly, a reader cannot help but be struck by how many of the authors were indeed provoked to tailor their responses to the precise facts of the Symposium Problem as given.

Some noted how young Claire Hopewell is, and how manipulative Ben Jones is. Many commented on the desperately short time span available for any action, and the consequent need for developing both immediate and longer-term strategies. Some took into account the practical difficulties that I have stressed throughout this Introduction: Frank Smith is not going to be released or spared merely upon the say-so of a lawyer or a clergyman or a psychiatrist, and certainly not without the cooperation of Ben Jones.

Not surprisingly, the most attention was lavished upon the character of Ben Jones himself. He is a life-long convict who has killed in cold blood, yet he has some flicker of a conscience that brands Frank Smith's impending death as "not right." He is self-centered and calculating, and unwilling to do the right thing without a return on his "investment," but he does not foreclose entirely the use of his name—"not yet," he says. Ben Jones has not attended religious services for years, yet he returns "home" to his old house of worship in a time of crisis—weeping. He could easily skip his therapy sessions, now that he is no longer under restraint, and he could easily lie to Dr. Palmer, but he does neither. Why any of these? Why all of these? Why now?

If you pose a stick figure hypothetical to professional commentators, you will obtain responses that are both unsubtle and uninteresting. Indeed, it might even be said that the responses will be "unprofessional," because the point of being a professional is to provide others with the benefits of your wisdom, and it is next to

impossible to say wise things about stick figures. The hypothetical given to the Symposium participants, however, did not confine them in this manner, and instead allowed full scope for their creativity.

I thus end where I started—joining Anthony Kronman in insisting that judgment and prudence are the key building blocks of professional experience. The Symposium authors—lawyers, clergymen, and psychotherapists—are professionals all, and have given selflessly of their wisdom. I invite readers to join them in a multi-disciplined inquiry into a most perplexing problem.

